APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED JANUARY 3, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-93-520

Barbara Gleason,

Plaintiff

vs

Frank Noyes, M.D., et al.,

Defendants

ORDER

On September 8, 1995, a jury found in favor of defendants on plaintiff's claims of malpractice, inadequate informed consent and negligent infliction of emotional distress arising from the death of plaintiff's husband, William Gleason, during his 1992 admission to Deaconess Hospital for the manipulation of his knee. This matter is before the court on plaintiff's motions for judgment notwithstanding the verdict and for a new trial and defendants' memoranda in opposition. (Docs. 70, 71, 72, 75).

A court can consider a motion for a judgment notwithstanding the verdict, or as it is now called a motion for a judgment as a matter of law, only if the moving party has

previously moved for a directed verdict at the close of all the evidence. Fed. R. Civ. P. 50; *Jackson v. City of Cookeville*, 31 F.3d 1354, 1357-1358 (6th Cir. 1994) (citing *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1522 (6th Cir. 1990)). When a party has failed to make the pre-verdict motion, the court may not rule on such a motion for judgment made after the verdict. *Id.*

Plaintiff did not make a motion for judgment as a matter of law at the close of the evidence after defendants rested. *(See* Doc. 60). Therefore, this Court may not consider plaintiff's motion for judgment notwithstanding the verdict.

The motion for a new trial is based primarily on the following grounds: 1) the verdict was against the weight of the evidence; 2) several asserted erroneous evidentiary rulings pertaining to the testimony of expert witnesses; and 3) defense attorney misconduct.

In a diversity case, the question of whether a new trial should be ordered is a federal procedural question decided by reference to federal law. *Toth v. Yoder Co.*, 749 F.2d 1190, 1197 (6th Cir. 1984). According to federal law, the granting or denying of a new trial is purely within the discretion of the trial court. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

In ruling on a motion for a new trial challenging the weight of the evidence, the court must compare the opposing proofs, weigh the evidence, and set aside the verdict only if it determines that the verdict is against the clear weight of the evidence. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993) (citing *Woodbridge v. Dahlberg*, 954 F.2d 1231,

1234 (6th Cir. 1992)). "The motion should be denied if the verdict is one which could reasonably have been reached, and 'the verdict is not unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable.' " *Id.* The court may not assess witness credibility, a function solely for the jury. *Cooke,* 991 F.2d at 343.

Plaintiff essentially argues that defendants' witnesses were not credible. This Court may not remake the jury's credibility determinations. There was substantial evidence from which the jury could reasonably have reached a verdict for the defendants.

An error in either the admission or exclusion of evidence may not be grounds for granting a new trial unless refusal to take such action is "inconsistent with substantial justice," Fed. R. Civ. P. 61; *TCP Industries, Inc., v. Uniroyal, Inc.,* 661 F.2d 542, 550 (6th Cir. 1981); or in the case of excluded evidence, the evidence would have caused a different outcome, *Nida v. Plant Protection Ass'n Nat'l,* 7 F.3d 522, 527 (6th Cir. 1993). This Court's rulings limiting the testimony of the expert witnesses in this case were intended, in part, to address issues of unfair surprise to the parties. Because of the abundance of expert testimony in this case from all parties, these limitations did not affect the substantial rights of the plaintiff nor would their absence have made a difference in the outcome of the trial.

Plaintiff's complaint that she was prejudiced by the lengthy curricula vitae of defendants' expert witnesses, contrary to District Judge Rubin's trial procedures, is specious. On February 6, 1995, this case was referred to the Magistrate Judge for final disposition by consent of the parties. The Magistrate Judge met with the parties on three separate occasions substantially in

advance of trial (Docs. 22, 27, 30), and at no time did this Court suggest that District Judge Rubin's trial rules would be in effect. The parties were told that the Magistrate Judge's procedures would be followed at trial. Moreover, at plaintiff's request this Court altered one of Judge Rubin's rulings by allowing plaintiff to call an additional expert witness. Although plaintiff contends that she believed that she was bound by Judge Rubin's trial procedures to limit experts' curricula vitae to one page, plaintiff did not even attempt to offer longer curricula vitae. No ruling of this Court prohibited plaintiff from providing the jury with additional information concerning her expert's qualifications, and plaintiff's failure to do so was her own choice.

Only attorney conduct that results in prejudice may serve as a basis for a new trial, *Clarksville-Montgomery County School System v. United States Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991) (citing *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980)), and the burden of showing harmful prejudice rests on the moving party, *Clarksville*, 925 F.2d at 1002. The Court must assess whether there is a reasonable probability that counsel's misconduct prevented the jury from reaching a fair or impartial verdict by examining the totality of the circumstances, including the nature of the comment, the court's and the parties' reactions, and the strength of the case. *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 387 (6th Cir. 1993) (citing *City of Cleveland*, 624 F.2d at 756), *cert. denied*, 114 S. Ct. 1298 (1994).

Plaintiff's counsel failed to object to most, if not all, of the incidents now identified as attorney misconduct. Nevertheless, in some instances the Court instructed the jury to disregard counsel's comments. For example, one defense attorney urged the jury at three separate points to "stand beside" his client as

he treated and cared for the plaintiff. Despite plaintiff's failure to object, the Court admonished the jury not to associate itself or put itself in the place of any party but rather to view the case objectively, as judges not advocates.

Although one defendant's attorney inappropriately personally attacked plaintiff's counsel, plaintiff's counsel did not object and responded in kind. At the conclusion of the parties' arguments, the Court noted that it should now be clear why this phase of the trial was called argument, and directed the jury to disregard reference to matters not in evidence. The jury charge again generally instructed the jury that "statements, questions and arguments of counsel are not evidence."

Given plaintiff's general failure to object to defense counsel's conduct, the Court's curative instructions to the jury, the fact that plaintiff's counsel also engaged in similar conduct, and the substantial evidence presented by defendants, we conclude that defense attorneys' conduct did not unduly influence the verdict.

This Court has carefully examined all the other issues raised in plaintiff's motion and found them to be insufficient to warrant a new trial. Accordingly, plaintiff's motions for a judgment notwithstanding the verdict and for a new trial are DENIED.

Date: 12-26-95
hrt

s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate Judge

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 29, 1997

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-3194/96/97

BARBARA GLEASON, As Executrix Of The Estate Of William C. Gleason, Deceased, And Individually,

Plaintiff-Appellant Cross-Appellee,

v.

FRANK R. NOYES, M.D.; CINCINNATI SPORTS-MEDICINE & ORTHOPAEDIC CENTER, INC.; RHODA MCMAHON;

Defendants-Appellees,

JEFF WINHOLT, M.D.; DEACONESS HOSPITAL;

Defendants-Appellees Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio

BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

RYAN, Circuit Judge. In this diversity personal-injury action, plaintiff, Barbara Gleason, appeals from a jury verdict

finding no cause of action on her claims of malpractice, lack of informed consent, and negligent infliction of emotional distress brought on behalf of the estate of her late husband, William C. Gleason. Plaintiff alleges that at trial defense counsel's closing arguments were improper and prejudicial; that the trial court erred in several of its evidentiary rulings; that two of the jury instructions were incorrect; and that the trial court's method for determining the number of jurors denied the plaintiff equal protection and due process under the law. Although we think the magistrate judge who presided over this trial made several errors, none of them substantially affected plaintiff's rights or prejudiced the jury's verdict. Therefore, the magistrate judge's denial of plaintiff's motion for a new trial will be affirmed.

I.

The parties and their counsel are very familiar with the facts of the case and the procedural details that underlie the assignments of error. Therefore, there is no need to reiterate them in this unpublished opinion.

We observe, however, as a preliminary matter that there are three standards of review applicable to this appeal: *de novo* as to rulings of law, *Miller v. Field*, 35 F.3d 1088, 1090 (6th Cir. 1994), plain error as to evidentiary admissions and exclusions that were not the subject of contemporaneous objection, Fed. R. Evid. 103(a) and (d), and abuse of discretion as to those rulings in which the magistrate judge was entitled to weigh multiple factors in making his determination, *United States v. Levy*, 904 F.2d 1026, 1029-30 (6th Cir. 1990). In addition, although harmless error is not a standard of review in the traditional sense, it is the criterion against which we test trial errors for unfair prejudice. *See* Fed. R. Civ. P. 61.

In a plain-error analysis, the affected party must show there was an error that is "clear and obvious under current law, and this error prejudicially affected the outcome of the trial. Even then, a court of appeals should exercise its discretion to reverse only when the result is a miscarriage of justice." *United States v. Rodgers*, 109 F.3d 1138, 1145 (6th Cir. 1997) (citations omitted). "Plain errors are limited to those harmful ones that are so rank that they should have been apparent to the trial judge without objection, or that strike at the fundamental fairness, honesty, or public reputation of the trial." *United States v. Causey*, 834 F.2d 1277, 1281 (6th Cir. 1987).

" 'Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.' " *Bowling v. Pfizer Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)). Harmless error is one that "does not affect the substantial rights of the parties." Fed. R. Civ. P. 61.

II.

A.

The plaintiff's first assignment of error is that she was denied a fair trial because of improper comments by defendants' counsel both in their opening and closing statements to the jury.

We have no doubt that several of the comments by defense counsel were improper. First, the attorneys personally vouched for the veracity of their clients' case and against the validity of Barbara Gleason's; they engaged in personal attacks on plaintiff's counsel; they insinuated that plaintiff's experts had fabricated

their testimony; and they argued evidence which was not in the record. Second, these comments were made frequently during closing arguments. Third, many of the comments were crucial to the central issue before the jury, which was whose experts were more credible. Fourth, since Barbara Gleason offered sufficient evidence from which to conclude that her husband's death could have been prevented through different prophylactic measures, the case was close and could have been affected by defense counsel's improper conduct. Fifth, the no-cause verdicts are consistent with jury prejudice.

On the other hand, the trial court's continuing instructions and the plaintiff's failure to object to most of the matters of which she now complains mitigates the effect of defense counsel's statements. The court instructed the jury 1) to disregard any argument by the attorneys as to why any unnamed expert did not testify, 2) that the statements and arguments of counsel were not evidence, and 3) to use their own recollection of the evidence where it conflicted with the attorneys' arguments. Most importantly, the plaintiff objected only once to any of defense counsel's inappropriate arguments, and that objection was to defense counsel's benign reference to an expert-finding service, concerning whose activities there was evidence in the record. While plaintiff is correct that repeatedly objecting during defense counsel's argument could aggravate the jurors, plaintiff's counsel failed even to ask for a sidebar conference in order to draw the court's attention to opposing counsel's improper argument, or to ask the court to caution defense counsel, out of the jurors' hearing, to desist from further impermissible statements. Instead, save for one objection — and that one meritless — counsel for plaintiff did nothing.

This court has held that "[t]he determination of the extent of permissible comment and argument by counsel rests primarily

in the judicial discretion of the lower court." *Twachtman v. Connelly*, 106 F.2d 501, 509 (6th Cir. 1939).

> Indeed, whether misconduct in a trial of a cause of action is of such a nature that a fair or impartial verdict cannot be reached is in the first instance for the trial court's determination. The trial court is, of necessity, clothed with a great deal of discretion in determining whether an objectionable question is so prejudicial as to require a retrial . . . [.] The trial court is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews only the cold record. It is for this reason that this Court has declared that the power to set aside verdict [sic] for misconduct of counsel should be sparingly exercised on appeal. . . .
>
> In determining whether there is a reasonable probability that the verdict of a jury has been influenced by improper coriduct, warranting that the verdict be set aside, a court must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself.

City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980) (internal quotation marks and citations omitted).

Plaintiff's failure to object precludes our review of her assignment of error under any standard other than plain error.

Thus, even though it was probably "clear and obvious under current law" that defendants should not have been allowed to make some of the statements complained of, plaintiff's failure to object requires her also to show that the improper argument prejudicially affected the outcome of the trial, resulting in a miscarriage of justice. On this one issue alone, plaintiff has not met her burden. The verdict is well supported by the evidence which included expert testimony that the defendants met the relevant standards of care. In light of plaintiff's failure to object to the defense counsel's improper comments and the abundance of evidence that the defendants were not liable for William Gleason's injuries and death, we decline to set aside the jury's verdict and order a new trial.

B.

Next, plaintiff points to six instances in which the magistrate judge allegedly erred in defendants' favor in admitting or excluding evidence. While we think the magistrate judge erred with regard to at least three of the challenged rulings, we are confident that, even taken collectively, these errors did not prejudice plaid case. As we have many times observed, the parties are not entitled to a perfect or error-free trial; they are entitled to one that is fair — if imperfect — and results in a verdict supported by the properly admitted evidence. This, we think, was such a trial. The trial court's errors did not strike at the heart of plaintiffs theory of her case, and it cannot be said that correct rulings would have in any respect altered the jury's verdict.

C.

As for plaintiff's assignment of error regarding the jury instruction on intervening cause, obviously, such an argument

is irrelevant. The jury found that none of the defendants' professional conduct had fallen below the appropriate standard of care in the first place; therefore, even if the instruction was erroneous, a correct instruction would have made no difference in the outcome of the trial, because the jury did not, nor did it need to, consider causation.

D.

Plaintiff's negligent infliction of emotional distress claim is grounded in an alleged violation of Ohio Revised Code § 2108.01 which regulates anatomical gifts of human bodies or body parts. Section 2108.08 provides:

> A person who in good faith acts, or attempts to act, in accordance with sections 2108.01 to 2108.12 of the Revised Code . . . is not liable for damages in any civil action . . . .

Ohio Rev. Code § 2108.08. Barbara Gleason contends that defendant Deaconess Hospital is not entitled to the benefit of this good-faith defense because Deaconess allegedly did not comply with the statute's other terms. Specifically, section 2108.04 requires that an anatomical gift "be made in one of the following ways: . . . (3) By a telephone call in which two persons receive *the* message and one of them prepares written documentation of the message, or by a telephone call that is recorded mechanically or electronically." Ohio Rev. Code § 2108.04 (emphasis added).

Barbara Gleason contends that, because the nurses who spoke with her did so consecutively, instead of simultaneously, they did not get *the* message as purportedly required by the

statute. That is, they each got *a* message, but not necessarily the same one. However, plaintiff's reading does not appear to be warranted either by the plain meaning or the spirit of the statute. Two nurses made one phone call in which one nurse spoke to Barbara Gleason and then passed the phone to the second nurse, who Deaconess contends confirmed the information recorded by the first. Both nurses spoke with Barbara Gleason, and one documented the conversation in writing. If the message had differed between nurse one and nurse two, then they probably would not have been acting in good faith if they had proceeded. The issue of good faith should have been, and was, given to the jury to decide. There was no error.

E.

Plaintiff's argument that her constitutional rights were violated by the court impaneling nine jurors and allowing each to participate in the verdict is equally meritless. Plaintiff now objects to the local practice followed by the magistrate judge of selecting six jurors plus one alternate for every week the trial was Acted to last. Of the nine selected, none was specifically designated as an alternate, and none was dismissed during the course of the trial. Thus, all nine deliberated and returned a unanimous verdict. Plaintiff claims that she was forced to convince more people in a three-week trial than in a two-day trial, violating her right to equal protection. She also claims that not knowing how many jurors she would have to eventually convince violated due process.

Not only is the sole case cited for this proposition inapposite, plaintiff's position cannot logically be sustained. First, there would certainly be a rational basis for distinguishing

between a two-day trial and a three-week trial in terms of the potential number of jurors who would need to be excused. Second, there is nothing fundamentally unfair about having to potentially convince six, seven, eight, or nine jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly, the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the Supreme Court has noted, increasing the number of jurors *increases* the reliability of verdicts. *See Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978).

F.

Because plaintiff's assignments of error fail, we need not consider the merits of defendant Dr. Jeff Winholt's and defendant Deaconess Hospital's argument that they should have been granted judgment as a matter of law by the trial court. Resolution of the above issues in favor of all defendants renders Dr. Winholt's and Deaconess Hospital's cross-appeal moot.

III.

For the foregoing reasons, the trial court's denial of plaintiff's motion for a new trial is hereby **AFFIRMED**.

APPENDIX C — SPECIAL INTERROGATORIES CONCERNING NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM AGAINST DEACONESS HOSPITAL

* * *

17. Was Deaconess Hospital's employee(s) negligent in exceeding the scope of plaintiff's permission regarding donation of organs or parts from Mr. Gleason's body?

No ✓

If your answer to question 17 is "no," go to paragraph 19, but if your answer is "yes," answer the following question:

18. Was the negligence of Deaconess Hospital's employee(s) the proximate cause of serious emotional distress suffered by plaintiff?

* * *

APPENDIX D — STATEMENT OF ISSUES FOR REVIEW

1. Whether the Magistrate Judge erred in refusing to follow Ohio law as set forth in the syllabus of *Ede v. Atrium South OB-GYN, Inc.*, (1994), 71 Ohio St.3d 124.

2. Whether defense counsel will be able to profit from a continuing course of misconduct throughout the litigation and the trial by the courts upholding a defense verdict.

3. Whether the Magistrate Judge erred in permitting a "retired" anesthesiologist to testify as an expert in violation of Ohio Rule of Evidence 601(D).

4. Whether the Magistrate Judge erred in not informing plaintiff's counsel that the pre-trial order of Judge Rubin was no longer applicable as to experts' curriculum vita and permitted defendants to admit as "evidence" defense experts entire resumes.

5. Whether the Magistrate Judge erred in foreclosing cross-exam of defendant Noyes with medical texts after his case-in-chief testimony.

6. Whether the Magistrate Judge erred in strictly ruling that *nothing* could be testified to at trial that was specifically stated during the discovery depositions.

7. Whether the local practice utilized in this case of converting the alternate jurors into the final jury and not dismissing them violates the Constitutional rights of a plaintiff in having a large number of people to convince?

8. Whether the Magistrate Judge erred in instructing the jury with a "but-for" test and intervening cause definition as to causation.

9. Whether the Magistrate Judge erred in instructing the jury on "good faith" [Ohio Revised Code 2108.08] immunity under the circumstances.

10. Whether the Magistrate Judge erred in permitting testimony concerning a written consent form in violation of Ohio Revised Code 2317.54.